FILE COPY

Office-Supreme Court, U.S.
FILED
APR 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO, *Appellant*,

v.

CLAYTON R. WATKINS, *Appellee*.

On Appeal From the Court of Appeals of Maryland

REPLY BRIEF FOR APPELLANT

JOSEPH SICKLES,
1003 K Street, N. W.
Washington, D. C.
CARLTON R. SICKLES,
1003 K Street, N. W.
Washington, D. C.
LAWRENCE SPEISER,
c/o American Civil Liberties Union
1612 Eye Street, N. W.
Washington, D. C.
LEO PFEFFER,
c/o American Jewish Congress
15 East 84th Street
New York 28, New York
BRUCE N. GOLDBERG,
4709 Montgomery Lane
Bethesda, Maryland

Attorneys for Appellant

Of Counsel:

GEORGE KAUFMANN,
LAURENCE J. COHEN.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
I. The Irrelevancy of the Declaration of Independence	1
II. Setting Out the Form of an Oath With the Words "So Help Me God"—in *Haec Verba* Does Not Indicate Any Legislative Intent of a Qualification of a Belief in God	2
III. Denying Public Office to Those Who Refuse to Profess a Belief in God Infringes on Religious Freedom	8
IV. Appellee's Position Rests on the Theory of the Rejected Meaning of the "Establishment of Religion" Clause	12
V. The Religious Test Oath Denies Appellant the Equal Protection of the Law	15
VI. The "No Religious Test" Clause of Article 6 of the United States Constitution Was Raised in the Court Below	15
Appendix A	17

CITATIONS

Abrams v. *United States*, 250 U.S. 616, dissenting opinion of Mr. Justice Holmes, p. 630	11
American Communications Assn. v. *Douds*, 339 U.S. 384	8
American Sugar Refining Co. v. *Louisiana*, 179 U.S. 89	14
Ashdown v. *Manitoba Press Co.*, 6 Man. 578	5
Blackburn v. *State*, 71 Ala. 319, 321, 46 Am. Rep. 323, 39 Am. Jur. 494	4
Bram v. *United States*, 168 U.S. 532	3
Cantwell v. *Connecticut*, 310 U.S. 296	11
Church of the Holy Trinity v. *United States*, 143 U.S. 457 (1892)	1, 10
Eaton v. *Price*, 360 U.S. 246	15
Everson v. *Board of Education*, 330 U.S. 1 (1947)	11, 12, 13
Fowler v. *Rhode Island*, 345 U.S. 67	11
Frost v. *Railroad Commission of California*, 271 U.S. 583	9

	Page
Garner v. *Public Works*, 34 U.S. 716	8
Gillars v. *United States*, 182 F. 2d 962 (2nd Cir. 1950)	5
Girouard v. *United States*, 328 U.S. 61	10
Hannegan v. *Esquire, Inc.*, 327 U.S. 146 (1946)	9
Hendrix v. *State*, 50 Ala. 148	3
Hudson v. *State*, 207 Ark. 18, 179 S.W. (2d) 165	5
In re Sage, 24 Oh. Cir. Ct. (N.S. 7)	4
Lancaster etc. R. Co. v. *Keaton*, 8 E. & B. 952, 955, 92 E.C.L. Rep. 952, 120 Reprint 354	4
Manhattan L. Ins. Co. v. *Cohen*, 234 U.S. 123	16
McCollum v. *Board of Education*, 333 U.S. 203 (1948)	12
O'Reilly v. *People*, 86 N.Y. 154, 40 Am. Rep. 525	5
People v. *Parent*, 139 Cal. 600, 601, 73 Pac. 423	4
People v. *Swist*, 136 Cal. 520, 69 Pac. 223	4
Petition of Plywacki, 205 F. 2d 423 (9th Cir. 1953), rev. 107 F. Supp. 593 (D. Hawaii, 1952); cf. 115 F. Supp. 613 (D. Hawaii, 1953)	3
Raley v. *Ohio*, 360 U.S. 423 (1959)	16
Schwimmer v. *United States*, 279 U.S. 644	10
Snowden v. *Hughes*, 321 U.S. 1	14
Spanaler v. *Dist. Ct.*, 104 Ut. 584, 140 Pac. (2d) 755; 67 C.J.S. 4	4
Speiser v. *Randall*, 357 U.S. 513 (1958)	9
State v. *Collier*, 23 Wash. (2d) 678, 162 Pac. (2d) 267	3
State v. *Hulsman*, 147 Iowa 572, 126 N.W. 700	4, 5
State v. *Mazon*, 90 N. Car. 676	4
State v. *Owen*, 72 N.C. 605, 612	3
State ex rel. Braley v. *Gay*, 59 Minn. 21, 60 N. W. 676	4, 5
Taylor v. *Beckman*, 178 U.S. 548	14
United States v. *Amtorg*, 71 F. 2d 524 (C.C.P.A. 1934)	4, 5
United States v. *MacIntosh*, 283 U.S. 605, 625, specifically overruled in Girouard v. United States, 328 U.S. 61	10
United States ex rel. Milwaukee Social Democrat Publishing Co. v. *Burleson*, 225 U.S. 407	9
Vaughn v. *State*, 146 Tex. Cr. R. 586, 177 S.W. (2d) 59	4
Vidal v. *Girard's Executors*, 2 How. 128	10
West Virginia Board of Education v. *Barnette*, 319 U.S. 624	11
Zorach v. *Clauson*, 343 U.S. 306	10, 12

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES:	Page
Article II, section 1(8)	7
Article VI	15
First Amendment	10
Fourteenth Amendment	11, 13, 14
CONSTITUTION OF MARYLAND:	
Articles 36 and 37	11

STATUTES AND REGULATIONS

Act of July 11, 1868, 15 Stat. 85	7
Act of March 2, 1917 (39 Stat. 954 c. 145 § 10), as amended by Act of May 17, 1932 (47 Stat. 158 c. 190); 48 U.S.C. § 873	6
Act of July 30, 1947 (61 Stat. 643, c. 389, 4 U.X.C. § 101	6
Act of June 25, 1948 (62 Stat. 907, c. 646); 28 U.S.C. § 453	7
Act of May 10, 1950 (64 Stat. 156 § 16(d) as amended by Act of April 5, 1952 (66 Stat. 43 C. 159 and as renumbered by Act of July 11, 1958 (72 Stat. 353, § 2 Public Law 85-510); 42 U.S.C. § 1874(d)	6
Act of January 12, 1951 (64 Stat. 1255 c. 1228 § 403(b), as amended by Act of March 5, 1952 (66 Stat. 13 c. 78 § 1(b)); 50 App., U.S.C., 1958 ed., § 2255(b)	6
Act of June 29, 1953 (67 Stat. 86 § 1); 50 App. U.S.C. 1958 ed. § 457(i)(7)	7
Act of July 22, 1954 (68 Stat. 509 c. 558 § 29); 48 U.S.C. 1958 ed., § 1543	6
Act of August 10, 1956 (70A Stat. c. 242); 10 U.S.C. § 4346(d)	6
Act of August 10, 1956 (70A Stat. c. 1041); 10 U.S.C. § 501	6
Act of August 10, 1956 (70A Stat. 602, c. 1041; 32 U.S.C. § 304	6
Act of July 7, 1960 (74 Stat. 353; Public Law 86-601	7
National Defense Education Act of 1958 (72 Stat. 1602 § 1001(f); Public Law 85-864); 20 U.S.C., 1958 ed., § 581(f)	5
Oaths Act of 1888, 51 & 52 Vict. c. 46	5
1 U.S.C. 1 § 1	2

Page

R.S. § 1 (1873) based on Act of Feb. 25, 1871, c. 71, 16 Stat. 431 3
R.S. §§ 391, 392, as amended by Act of March 5, 1874 (18 Stat. 19 C. 46); 5 U.S.C. § 365 7
R.S. § 1757, as amended by Act of May 13, 1884 (23 Stat. 22, c. 46 §§ 2, 3); 5 U.S.C. § 16 7

MISCELLANEOUS

A & E Ann. Cas. 723, Note 5 3
Vol. XX, A.C.L.U. of Northern California News, #2, Feb. 1955 3
Bentham, *Swear Not At All* in V *Jeremy Bentham's Works* (Bowring Ed. 1843), 187 5
Black's L.D. (1951), 4th Ed., 81, 1220 4
Cooley's *Principle of Constitutional Law* 12
9 Encyclopedia of the Laws of England, Oaths, 248-52 (Renton ed. 1898) 5
9 Holdsworth, *A History of English Law*, 189-91 (1926) 5
McCormick, *Evidence* § 63 (1954) 5
Note, 36 N.Y.U. Law Review 513, 515 and footnotes .. 5
Pfeffer, *Church, State & Freedom*, pp. 109-12, 2091 ..... 2, 13
20 R.C.L. 508 3
White, Oaths in Judicial Proceedings, 42 (N.S.) Am. Law Reg. 373 (1903), and appendix 446 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO, *Appellant*,

v.

CLAYTON R. WATKINS, *Appellee*.

On Appeal From the Court of Appeals of Maryland

REPLY BRIEF FOR APPELLANT

I. The Irrelevancy of the Declaration of Independence.

Whenever issues of church-state separation arise in the United States, invariably the Declaration of Independence and the references in it to a "Creator", "Supreme Judge" and "Divine Providence" are cited as justification for the position that our nation and government were founded on a belief in God.[1] Generally ignored are the circumstances under which the Declaration of Independence was drafted and the purpose of it. In 1776, little thought was given to the type of government which was to be established if the independence movement succeeded.

[1] E.g., *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892).

When the Revolutionary War had ended and the time came to draft the Constitution for this new nation, no reference was made in it to a Supreme Being, in striking contrast to the references in the Declaration of Independence.

The omission was not accidental. It was a deliberate, conscious choice of the Constitutional Convention and was bitterly criticized by some during the debates in the States during its ratification.[2]

In drafting a Constitution, the men of 1787 were confronted with the task of creating a government for a pluralistic society—not merely breaking away from another country. It is to the Constitution with its Bill of Rights that we must look to resolve the issue in this case. The Declaration of Independence, for all its historical importance in breathing fire and spirit into the American Revolution, is for our present problem irrelevant.

II. Setting Out the Form of An Oath With the Words "So Help Me God"—in Haec Verba Does Not Indicate Any Legislative Intent of a Qualification of a Belief in God.

Appellee attempts to justify its position that a belief in God is a valid requirement for public office because many oaths set out *in totidem verbis* contain the words "So Help Me God", including oaths required under federal law.

However, appellee's conclusion is completely unwarranted. In the present 1 U.S.C. § 1, the following rule of construction is set forth:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * oath includes affirmation, and sworn includes affirmed; * * *"
>
> 61 Stat. 633 (1947), amended 62 Stat. 859 (1948), amended 65 Stat. 710 (1951); 1 U.S.C.A. § 1.

[2] Pfeffer, *Church, State & Freedom*, pp. 109-112, 209.

This rule that a "requirement of an oath shall be deemed complied with by making affirmation in judicial form" has been part of our law since 1871. Rev. Stat. Sec. 1 (1873), based on Act of February 25, 1871, c. 71, 16 Stat. 431; *Bram* v. *United States*, 168 U.S. 532, 566.

In *Petition of Plywacki*, 205 F. 2d 423 (9th Cir. 1953), reversing 107 F. Supp. 593 (D. Hawaii, 1952), the Government confessed error after the District Court decided that the words "So Help Me God" in the oath of allegiance for naturalization required a belief in God as a condition for naturalization. The Government's confession of error was based on 1 U.S.C. § 1, *supra*.[3]

Statutes prescribing the form of an oath are not intended to impose an inflexible formula admitting of no deviation in words, but are intended rather to direct and point out the essential matter to be embraced in an oath (20 R.C.L. 508), and it has generally been held that a substantial compliance with the requirements of a statute prescribing the form of oath to be administered is sufficient.[4]

The crux of the appellee's argument on this point depends on whether the words "So Help Me God" in an oath are a substantive part of the oath itself or merely part of the ceremony of administering the oath.

A California decision has given the answer in clear and unequivocal terms:

---

[3] The District Court did not give up lightly, 115 F. Supp. 613 (D. Hawaii, 1953). On a motion to transfer the petition, the District Court observed that the Court of Appeals had not examined the merits of the case. The petitioner, nonetheless, was finally naturalized by affirmation, in the District Court of Portland, Oregon on January 4, 1955, Vol. XX, ACLU of Northern California News, No. 2, February, 1955.

[4] See Note 5, A. & E. Ann. Cas. 723; *State* v. *Collier*, 23 Wash. (2d) 678, 162 Pac. (2d) 267; *Hendrix* v. *State*, 50 Ala. 148; *State* v. *Owen*, 72 N.C. 605, 612.

> "The words 'so help me God' are no part of the oath or thing sworn to—that the witness will tell the truth—for they do not extend the operation of the oath. They are part of the form and manner and pertain to the mode of administering it, and like kissing the Bible or raising the hand, are merely the sanction or pledge that the substance of the oath—the declaration to tell the truth—will be kept."
>
> *People* v. *Parent*, 139 Cal. 600, 601, 73 Pac. 423.[5]

In its broadest sense, an oath includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully.[6]

Since an affirmation is a solemn and formal declaration or affirmation that a person is telling the truth (Black's L.D. (1951), 4th Ed., 81), it would most certainly appear to be covered by the above definition as an oath. As Justice Graham said in *United States* v. *Amtorg*, 71 F. 2d 524, 530 (C.C.P.A. 1934);

> "That an affirmation is equivalent to an oath is well settled. The Constitution makes it so in the oath of the President, article 2, sec. 1; when the Senate tries impeachments, article 1, section 3, and in the oaths of State and United States officers, article 6."

It is true that definitions of oaths used to be framed in religious terms: *i.e.*, an appeal by a person to God to witness the truth of what he has declared (*Blackburn* v. *State*, 71 Ala. 319, 321, 46 Am. Rep. 323, 39 Am. Jur. 494) or an imprecation of divine punishment or vengeance

---

[5] See also: *Lancaster etc. R. Co.* v. *Keaton*, 8 E. & B. 952, 955, 92 E.C.L. Rep. 952, 120 Reprint 354; *People* v. *Swist*, 136 Cal. 520, 69 Pac. 223; *State* v. *Hulsman*, 147 Iowa 572, 126 N.W. 700; *State* v. *Mazon*, 90 N. Car. 676.

[6] Black's L.D. (1951), 4th Ed., 1220; *State ex rel. Braley* v. *Gay*, 59 Minn. 6, 60 N.W. 676; *In re Sage*, 24 Oh. Cir. Ct. (N.S.) 7; *Vaughn* v. *State*, 146 Tex. Cr. R. 586, 177 S.W. (2d) 59; *Spangler* v. *Dist. Ct.*, 104 Ut. 584, 140 Pac. (2d) 755; 67 C.J.S. 4.

on him if what he says is false (*Hudson* v. *State*, 207 Ark. 18, 22, 179 S.W. (2d) 165, 169). However, definitions of this kind ignore completely the reasons for oaths and, instead, sanctify form rather than substance.

> "The purpose of an oath is to secure the truth and hence any form thereof which is ordinarily calculated to appeal to the conscience of the person to whom it is administered and by which he signified that his conscience is bound is sufficient."
>
> *State* v. *Hulsman*, 147 Iowa 572, 573, 126 N.W. 700.[7]

At common law, it was felt that a person would not tell the truth unless he were afraid that some form of divine vengeance would be inflicted on him if he lied.[8] But the tendency of modern constitutions, statutes, and court decisions is to abolish the religious test of the common law. (White, *Oaths in Judicial Proceedings*, 42 (N.S.) Am. Law Reg. 373 (1903), and appendix 446.)[9]

The appellee sets out a number of oaths in which the words "So Help Me God" are written out. He ignores the many oaths in which the language of the oath is like-

[7] See also *State ex rel. Braley* v. *Gay*, 59 Minn. 21; 60 N.W. 676; *O'Reilly* v. *People*, 86 N.Y. 154, 40 Am. Rep. 525.

[8] McCormick, *Evidence* § 63 (1954). See 9 Holdsworth, *A History of English Law* 189-91 (1926); 9 Encyclopedia of the Laws of England, Oaths 248-52 (Renton ed. 1898). See criticism of this point of view by Bentham, *Swear Not at All* in V *Jeremy Bentham's Works* (Bowring Ed. 1843), 187.

[9] See excellent Note, 36 N.Y.U. Law Review 513, 515 and footnotes; *Ashdown* v. *Manitoba Press Co.*, 6 Man. 578; *United States* v. *Amfory*, 71 Fed. (2d) 524 (C.C.A. 1934); *Gillars* v. *United States*, 182 Fed. (2d) 962 (2nd Cir. 1950).

England has allowed affirmation since the Oaths Act of 1888, "in the case of every person objecting to be sworn, and stating as the grounds of such objections, either that he has no religious belief or that taking of an oath is contrary to his religious beliefs." (51 & 52 Viet. c. 46.)

wise set out *in haec verba*, but in which the words "So Help Me God" do not appear.[10]

[10] ***Members of State Legislatures and State Officers:*** Every member of a State Legislature, and every executive and judicial officer of a State, shall, before he proceeds to execute the duties of his office, take an oath in the following form, to wit: "I, A B, do solemnly swear that I will support the Constitution of the United States." Act of July 30, 1947 (61 Stat. 643, c. 389); 4 U.S.C. § 101.

Attorney Upon Admission to the Supreme Court Practice: "I, _____, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States." Rules of the Supreme Court of the United States, Rule 5(4); 28 U.S.C. Appendix.

National Science Foundation Scholarship or Fellowship: "I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies, foreign and domestic." Act of May 10, 1950 (64 Stat. 156 § 16(d) as amended by Act of April 5, 1952 (66 Stat. 43 C. 159) and as renumbered by Act of July 11, 1958 (72 Stat. 353 § 2 Public Law 85-510); 42 U.S.C. § 1874(d).

Similarly: ***Armed Forces Enlistment Oath,*** Act of August 10, 1956 (70A Stat., c. 1041); 10 U.S.C. § 501.

Cadets on Admission to the Academy, Act of August 10, 1956 (70A Stat. 242); 10 U.S.C. § 4346(d).

National Guard Enlistment Oath, Act of August 10, 1956 (70A Stat. 602, ch. 1041); 32 U.S.C. § 304.

National Defense Education Act of 1958: Act of September 2, 1958 (72 Stat. 1602 § 1001(f); Public Law 85-864); 20 U.S.C., 1958 ed., § 581(f).

Officials of Puerto Rican Courts: Act of March 2, 1917 (39 Stat. 954 c. 145 § 10), as amended by Act of May 17, 1932 (47 Stat. 158 c. 190); 48 U.S.C. § 873.

Government Officials of the Virgin Islands: Act of July 22, 1954 (68 Stat. 509 c. 558 § 29); 48 U.S.C. 1958 ed., § 1543.

Civil Defense Officers and Employees: Act of January 12, 1951 (64 Stat. 1255 c. 1228 § 403(b), as amended by Act of March 5, 1952 (66 Stat. 13 c. 78 § 1(b)); 50 App., U.S.C., 1958 ed., § 2255(b).

Compare with the oaths required by the following acts of Congress, where "So Help Me God" *is* set out:

Further proof that "So Help Me God" is not a substantive part of an oath may be seen from the recent taking of the oath of office by President John F. Kennedy on January 20, 1961. The United States Constitution, Art. II, sec. 1(8), states the President before entering office shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

In spite of the fact that the words "So Help Me God" do not appear in this oath, President Kennedy added them at the end, as have probably all other Presidents. It could not seriously be contended that President Kennedy and all previous Presidents were not validly sworn into office because they took an oath of office other than the one set forth in the Constitution, *i.e.*, by adding words not contained in the Constitutional oath. The only possible logical conclusion is that the words "So Help Me God" are not a substantive part of an oath.

Senators, Representatives, Members of State Legislatures, and others: Act of July 11, 1868, 15 Stat. 85.

Executive Departments and All Federal Officers: R. S. § 1757, as amended by Act of May 13, 1884 (23 Stat. 22, c. 46 §§ 2, 3); 5 U.S.C. § 16.

Postal Service: R. S. §§ 391, 392, as amended by Act of March 5, 1874 (18 Stat. 19 C. 46); 5 U.S.C. § 365.

Justices and Judges: Act of June 25, 1948 (62 Stat. 907, c. 646); 28 U.S.C. § 453.

Reserve Officers Training Corps (ROTC) Loyalty Oath: Act of July 7, 1960 (74 Stat. 353; Public Law 86-601).

Alien Physicians, Dentists and Allied Specialists Inducted and Appointed as Commissioned Officers: Act of June 29, 1953 (67 Stat. 86 § 1); 50 App. U.S.C. 1958 ed. § 457(i)(7). Universal Military Training & Service Act.

III. Denying Public Office to Those Who Refuse to Profess a Belief in God Infringes on Religious Freedom.

Appellee lightly dismisses the Hobson's choice he grants appellant. He is perfectly free, appellee says, to hold any belief whatsoever; he is merely denied a notary public commission if he refuses to make the required declaration.

We concede that there is no constitutional or inherent right to hold any type of public office, but there is a constitutional right not to be *barred* from public office by an arbitrary, unreasonable, unconstitutional requirement.

This Court has too many times had this argument presented in terms of "rights" and "privileges" and has always cut through such sophistry in discussing the problem. As Mr. Justice Frankfurter said in his concurring opinion in *Garner* v. *Board of Public Works*, 341 U.S. 716, 725: "To describe public employment as a privilege does not meet the problem." This Court has avoided becoming involved in a semantic discussion of whether a "right" or a "privilege" is involved, but, instead, has decided cases in far broader terms, mindful of its role in balancing vital interests going to the very heart of our society.

In *American Communications Assn.* v. *Douds*, 339 U.S. 384, the Court noted the governmental agency argument:

> "The Board (NLRB) has argued on the other hand that Section 9(h) (the non-Communist oath) presents no First Amendment problem because its sole sanction is the withdrawal from non-complying unions of the 'privilege' of using its facilities." (p. 389.)

However, the Court would not accept this contention and stated:

> "By exerting pressures on unions to deny offices to Communists and others identified therein, Section 9(h) undoubtedly lessens the threat to interstate commerce, but *it has the further necessary effect of discouraging the exercises of political rights protected by the First Amendment.*" (Emphasis added.) (p. 393.)

In the case of *Frost* v. *Railroad Commission of California*, 271 U.S. 583, the Court posed the question before it in these terms:

> "The naked question which we have to determine, therefore, is whether the state may bring about the same result (converting private carriers into public carriers against their will) by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which without so deciding we shall assume to be within the power of the state altogether to withhold if it sees fit to do so?" (p. 592.)

The Court answered its own question in words which are equally applicable to the requirement here involved:

> "May it stand in the conditional form?
> "If so, constitutional guarantees so carefully guarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to the form alone, the act here is an offer to a private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject.
> "It would be a palpable incongruity to strike down an act of state legislation which by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under a guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."

To a similar effect is *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946), and the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States ex rel. Milwaukee Social Democrat Publishing Co.* v. *Burleson*, 225 U.S. 407, 421-423, 430-432, 437, 438. In *Speiser* v. *Randall*, 357 U.S. 513 (1958), the Court also refused to accept such a myopic approach to the problem.

When a person is placed under a disability because of his religious beliefs, or lack of them, then there is an im-

pairment of religious liberty. Whether the disability or requirement is a valid one is another question—but, certainly, the reality and practical effect of the so-called choice cannot be ignored.

Even if the materials relied on by appellee (Appellee's Brief, pp. 5-10) had the sweep which he ascribes to them, they would not confirm the validity of the holding of the Court below that the constitutional protection of religious liberty "does not encompass the ungodly" (R.T. 19). For acceptance of the premise that "we are a religious people,[11] even if unqualified by definitional doubts,[12] does not support a denial of First Amendment liberties to nonbelievers. A further assumption is necessary: that the authors of the Bill of Rights intended to benefit only those who shared their opinions on religion and polity. But this Court has refused to ascribe such parochialism to the Founding Fathers. In *Girouard* v. *United States*, 328 U.S. 61, 68, the Court adopted the language of Mr. Justice Holmes, dissenting in *Schwimmer* v. *United States*, 279 U.S. 644, 654-5:

> ". . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country."

[11] *Zorach* v. *Clauson*, 343 U.S. 306, 313. At pp. 16-20 of our opening brief we paid special attention to the *Zorach* case, because of the heavy reliance placed on it by the Court below. We there showed that the case does not authorize Maryland's action here, and, indeed, supports appellant. Appellee, though also relying on *Zorach* does not comment on this discussion (Appellee's Brief, pp. 10, 16).

[12] It is not insignificant that two of the cases cited by appellee go further and say that "We are a Christian people". *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 470; *United States* v. *MacIntosh*, 283 U.S. 605, 625 specifically overruled in *Girouard* v. *United States*, 328 U.S. 61. See also *Vidal* v. *Girard's Executors*, 2 How. 128, 198-201.

In no area of human opinion and controversy has the clash among "fighting faiths"[13] been more intense, and the oppression more sustained than in that of religion. To the people of the thirteen original states, this historic truth (still tragically undiminished in our own time) was a matter of such importance that they insisted on the enactment of a Bill of Rights which would protect religious liberty and permanently separate church and State. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). They intended to foreclose government forever from determining what is orthodox and, indeed, what is "religion." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . ." *West Virginia Bd. of Education* v. *Barnette*, 319 U.S. 624, 638. They knew, from the experience of centuries, that unless the ideas of all are safe, the ideas of none are. This very case proves the point again. The Court below (R.T. 19) and appellee in his brief (pp. 8, 9, 15) read Art. 36 and 37 of the Maryland constitution *in pari materia*. Thus, not only atheists, but all who doubt moral accountability to God are proscribed. "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *West Virginia Bd. of Education* v. *Barnette*, *supra*, 319 U.S. at 641. The grudging concession of the Court below that, "We may assume that there may be permissible differences in the individual's conception of God" fails even to approximate the standard of religious liberty which the First Amendment made law.

Appellee also states that "This Court has on many occasions upheld state statutes which allegedly interfere with religious liberty, but the Court has never found such State action improper." (Appellee's Brief, p. 12). *Cantwell* v. *Connecticut*, 310 U.S. 296, *West Virginia Board of Education* v. *Barnette*, *supra*, and *Fowler* v. *Rhode Island*,

[13] *Abrams* v. *United States*, 250 U.S. 616, dissenting opinion of Mr. Justice Holmes, p. 630.

345 U.S. 67, are three particularly apposite examples and are squarely to the contrary.

IV. Appellee's Position Rests on the Theory of the Rejected Meaning of the "Establishment of Religion" Clause.

The key to appellee's position is on page 17 of his brief in his quote from Cooley's *Principle of Constitutional Law*, where he states:

> "By establishment of religion is meant the setting up or recognition of a state church or at least conferring upon one church of special favors and advantages which are denied to others."

From this it can be seen that the State of Maryland adheres to a point of view completely at variance to the meaning of the establishment-of-religion clause which this Court explicitly set forth in *Everson* v. *Board of Education, supra*, and to which it has adhered ever since. In *Everson* and in the subsequent cases of *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) and *Zorach* v. *Clausen, supra*, there were two competing views on the meaning of the establishment clause presented to the court: one held the establishment clause merely prohibited the setting up of a single state church and thus discriminating against all others, while the other held that it prohibited any aid to all churches and religion even on a non-discriminatory basis. *Everson* laid this issue to rest, and, we trust, permanently, when the latter view was adopted.

Appellee agrees (Appellee's Brief, p. 15) that *Everson* v. *Board of Education, supra*, is critical on the establishment clause. He asserts, however, that "the activity of the State of Maryland . . . in requiring its public officers to express a belief in the existence of God or moral accountability to God do not in any way contravene any of the propositions" declared in that opinion. We submit that one sentence expressly, and the spirit of the entire passage, forbid absolutely what Maryland attempts to do:

> "Neither [a state nor the Federal Government] can force nor influence a person to go to or remain away from church against his will *or force him to profess a belief or disbelief in any religion.*" 330 U.S. 1 at 16. (Emphasis added)

Maryland would require appellant to "profess a belief in [some] religion" to hold public office. It may not do so. "The 'establishment of religion' clause of the First Amendment means at least this." *Id.* at 15.

However, appellee leaps to the conclusion that if appellant's position in this case is correct, any verbal or oral recognition by the state or national government of the existence of God violates the First Amendment to the Constitution. Perhaps, but that is not the issue here. Recognition is not the problem, but *coerced* recognition is. These are two different problems.

There really is no effective way to stop a President from referring to God if he so desires in messages of the State of the Union nor the opening of the Court with the supplication "God Save the United States and this Honorable Court." [14]

Not only that, there is just no practical way to test the constitutionality of these practices. The assumption of constitutionality of statements by agencies of the federal or state government acknowledging the existence of God is unwarranted. A practice of unproved constitutionality should not be used to prove the constitutionality of another practice.

V. The Religious Test Oath Denies Appellant the Equal Protection of the Law.

Since by what has already been said appellant has proved that Maryland's test oath denies him religious liberty, and violates the "establishment" clause, it would be no defense to Maryland even if the test oath were a reasonable classi-

---

[14] Pfeffer, op. cit., pp. 206-9.

fication. One constitutional prohibition is enough. But appellee's efforts to sustain the reasonableness of the oath are readily disposed of; indeed, they have already been answered in large measure by this Court:

> "Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, *religious opinions*, political affiliations or other considerations having no possible connection with the duties of citizenship as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws." *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89, 92. (Emphasis added.)

Religious opinions have no more connection with capacity for public office than they have with taxpaying. Appellee contends that there is such a nexus because of the oath-administering function of the notary public (R.T. 19). The "paradox" which appellee posits is entirely contrived. Appellant does not disavow "the sanctity of the very oath he administers". This very proceeding was necessitated by his refusal to swear falsely and hypocritically to a belief he does not hold. Atheists as a class are no less worthy of belief than those whose oath invokes divine sanctions—as the overwhelming majority of states have recognized in removing from atheists the common law disqualification as witnesses.

Appellee urges also that the Fourteenth Amendment does not limit the states in fulfilling public office (Appellee's Br., p. 18). *Snowden* v. *Hughes*, 321 U.S. 1, does not so hold. On the contrary, it was there said that "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 11. In *Taylor* v. *Beckman*, 178 U.S. 548, on which appellee relies heavily (Appellee's Br., pp. 11, 18) it was indeed said that public office is not "property" within the Fourteenth Amendment. But while the case has not been formally overruled, recent decisions imposing constitu-

tional limits on the states' power to prescribe qualifications and conditions for public office have drained this abstract proposition of all practical consequence.

VI. The "No Religious Test" Clause of Article 6 of the United States Constitution Was Raised in the Court Below.

The Court of Appeals stated incorrectly that "The appellant does not contend that clause three of Article VI of the Federal Constitution is applicable to the States." (R.T. 17) but went on to rule that it was "clearly inapplicable" in any case.

The Article VI argument has been made consistently since the case began. It was urged in the original complaint for mandamus.[15]

It was urged on the Court of Appeals by the American Civil Liberties Union as *Amicus Curiae*.[16]

It was not included in the brief of appellant simply because the Chief Judge of the Maryland Court of Appeals wrote the American Civil Liberties Union granting its request to file an *amicus* brief, but urging that all "unnecessary duplication be avoided.[17]

In *Eaton* v. *Price*, 360 U.S. 246, affirmed by the Court in a 4 to 4 decision, the federal constitutional ground of violation of the Fourteenth Amendment was raised in the Court below, the Ohio Supreme Court, only by the Ohio Civil Liberties Union, and the Dayton Chapter, Civil Liberties Union, in their *amici curiae* brief.[18] None of the Jus-

---

[15] R. T. 4, para. 12.

[16] See Point Four of *Amicus* Brief of American Civil Liberties Union, pp. 11-13, a copy of which is herewith lodged with the Court.

[17] See letter dated February 8, 1960, by Chief Judge Frederick W. Brune of the Maryland Court of Appeals, Appendix A herein.

[18] See Appellant's Substitute Brief on Merits, *The State ex rel. Eaton* v. *Price, Chief of Police*, No. 30, October Term, 1959, p. 25, and Appendix, p. 47.

tices of this Court raised the question of whether the federal constitutional question had been abandoned because of that circumstance.

In *Raley* v. *Ohio*, 360 U.S. 423 (1959), the Court stated that "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." See *Manhattan L. Ins. Co.* v. *Cohen*, 234 U.S. 123 [p. 436]. Here the Maryland Court of Appeals did rule on the "religious test" clause of the Constitution, by stating it was "clearly inapplicable." (R.T. 17)

Respectfully submitted,

JOSEPH SICKLES,
1003 K Street, N. W.
Washington, D. C.

CARLTON R. SICKLES,
1003 K Street, N. W.
Washington, D. C.

LAWRENCE SPEISER,
c/o American Civil Liberties Union
1612 Eye Street, N. W.
Washington, D. C.

LEO PFEFFER,
c/o American Jewish Congress
15 East 84th Street
New York 28, New York

BRUCE N. GOLDBERG,
4709 Montgomery Lane
Bethesda, Maryland
Attorneys for Appellant

Of Counsel:

GEORGE KAUFMANN,
LAURENCE J. COHEN.

APPENDIX A

March 23, 1961.

These are copies of letters on file in the office of the Clerk of the Court of Appeals of Maryland.

J. LLOYD YOUNG,
Clerk.

February 8, 1960.

Lawrence Speiser, Esq.,
Attorney for
American Civil Liberties Union,
1613 Eye Street, N. W.,
Washington 6, D. C.

Re: Torcaso v. Watkins, #199, Sept. Term, 1959

Dear Sir:

Mr. J. Lloyd Young, Clerk of the Court of Appeals, has referred to me your letter of January 20 in which you request permission to file an *amicus curiae* brief on behalf of the American Civil Liberties Union in support of the appellant's position. Such a brief may be filed. I assume, of course, that at least one of the counsel submitting the same will be a member of the Maryland Bar.

I am advised that the brief of the appellant is to be filed not later than March 1st, and the brief of the appellee is to be filed twenty days thereafter. I would suggest that in order to avoid unnecessary duplication you examine the brief for the appellant. With that in mind and in order that the Attorney General may have before him the briefs submitted on behalf of *amici curiae* before filing his brief, I think that each *amicus* brief should be filed on or before March 15, 1960.

For your information, Max Gressman, Esq., Attorney for American Ethical Union, 551 Fifth Avenue, New York 17, N. Y., has also requested permission to file an *amicus*

brief. Perhaps you will wish to communicate with him with regard to the contents of your brief.

Very truly yours,

/s/ FREDERICK W. BRUNE,
Chief Judge.

FWB/IB
CC: HON. C. FERDINAND SYBERT,
Attorney General of Maryland,
STEDMAN PRESCOTT, JR., ESQ.,
Deputy Attorney General,
JOSEPH A. SICKLES, ESQ.